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**Date of Issuance 11/26/2014**

Decision 14-11-041 November 20, 2014

**BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA**

Application of Pacific Gas and Electric  
Company Proposing Cost of Service and Rates  
for Gas Transmission and Storage Services for  
the Period of 2015-2017. (U39G)

Application 13-12-012  
(Filed December 19, 2013)

And Related Matter.

Investigation 14-06-016

**DECISION MODIFYING LAW AND MOTION JUDGE'S RULING IMPOSING  
SANCTIONS FOR VIOLATION OF *EX PARTE* RULES**

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## **DECISION MODIFYING LAW AND MOTION JUDGE'S RULING IMPOSING SANCTIONS FOR VIOLATION OF EX PARTE RULES**

### **Summary**

This decision modifies the Law and Motion ruling issued October 16, 2014 in this proceeding and imposes additional sanctions. To reach the modified conclusions in this decision, we repeat the discussion and weighing of the arguments and evidence contained in the Law and Motion Judge's ruling, verbatim where appropriate, and modified where appropriate.

The Law and Motion Judge's ruling found Pacific Gas and Electric Company (PG&E) to be in contempt of the Commission for engaging in *ex parte* communications regarding the assignment of this proceeding to a particular Administrative Law Judge in violation of Rules 1.1 and 8.3(f) of the Commission's Rules of Practice and Procedure. The ruling bans PG&E from engaging in *ex parte* communications with Commissioners or their advisors, other than during all-party meetings, and subject to additional restrictions on communications, regarding this or any other ratesetting or adjudicatory proceeding before the Commission, for a one-year period or until the resolution of this proceeding, whichever is later.

This decision affirms those sanctions with several modifications: the additional *ex parte* restrictions for PG&E are clarified to be in place for one year from the date of this decision for all other ratesetting or adjudicatory proceedings; for this proceeding, the additional restrictions will be in place until the conclusion of the proceeding. In addition, reporting of staff interactions will be required within three days for contacts with Commission senior management, as specified herein.

PG&E is also ordered to pay a penalty of \$1,050,000 for the Rule violations. In addition, PG&E's conduct is found to have created the potential for significant ratepayer harm resulting from the delay caused by the necessity to re-assign a new administrative law judge to this case. As a ratemaking remedy for this consequence, this decision requires that, as part of the final decision in this case, PG&E shareholders shall cover a significant portion of the revenues that would normally have been collected from ratepayers during the five-month delay caused by PG&E's actions, as measured by the difference between the anticipated decision timing in the original scoping memo (March 2015) and the new target date based on a revised scoping memo issued November 13, 2014 (August 2015). The exact amount of this ratemaking remedy for ratepayer reparations will be calculated at the time a final decision is rendered in this case.

These sanctions and remedies are rendered in response only to the self-reported violations that PG&E disclosed on September 15, 2014 and that were the subject of the October 7, 2014 hearing in this proceeding. This decision does not preclude Commission action on any other violations in this proceeding or other proceedings that may be discovered in the future.

## **Background**

On September 15, 2014, Pacific Gas and Electric Company (PG&E) filed a "Notice of Improper Ex Parte Communications" in this proceeding. The PG&E notice attaches e-mails dated from January 9 to January 29, 2014, between PG&E's Vice President of Regulatory Affairs Brian Cherry and the advisor to Commission President Peevey, Carol Brown; between Cherry and Commissioner Florio; and between Cherry and President Peevey regarding the assignment of this proceeding to particular Administrative Law Judges and pressing for the assignment of this proceeding to Judge John S. Wong. In several of the e-mails,

Cherry objects to one judge because “I’m not sure we could get someone worse,” and to another judge for having “a history of being very hard on us” and having “screwed us royally.”

By ruling of the assigned Law and Motion Administrative Law Judge dated September 17, 2014,<sup>1</sup> PG&E was ordered to appear and show cause why it should not be held in contempt of the Commission and sanctioned for violating Rules 1.1 and 8.3(f) of the Commission’s Rules of Practice and Procedure. Rule 1.1 requires, in part, that any person who transacts business with the Commission agrees “to maintain the respect due to the Commission, members of the Commission and its administrative law judges.” Rule 8.3(f) expressly provides, “*Ex parte* communications regarding the assignment of a proceeding to a particular Administrative Law Judge, or reassignment of a proceeding to another Administrative Law Judge, are prohibited.”

As prescribed by the ruling, PG&E filed a timely response on October 2, 2014. The City of San Bruno (San Bruno), The Utility Reform Network (TURN) and United Energy Trading, LLC (UET) also filed timely responses.

On October 6, 2014, PG&E filed an “Update Re September 14, 2014, Notice of Improper Ex Parte Communications.” The update reports oral *ex parte* communications between Cherry and President Peevey that occurred on May 30, 2010, including communications regarding substantive issues in PG&E’s 2011 General Rate Case (Application (A.) 09-12-020), PG&E’s Application for Approval of 2008 Long-Term Request for Offer Results (A.09-09-021), PG&E’s Application for Approval of the Manzana Wind Project (A.09-12-002), and the

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<sup>1</sup> After consultation with the Acting Chief Judge, and to avoid any appearance of impropriety in its handling, then-assigned Administrative Law Judge Wong referred this matter to Administrative Law Judge Yacknin in her capacity as Law and Motion Administrative Law Judge. (See Rule 11.17.)

Energy Efficiency Risk/Reward Incentive Mechanism Rulemaking (R.09-01-019), and, among other matters, communications soliciting PG&E's contribution toward fighting a then-pending ballot measure and a 100<sup>th</sup> anniversary celebration for the Commission.

The update also reports e-mail *ex parte* communications between Cherry and Commissioner Florio concerning substantive issues in the Rulemaking on the Commission's Own Motion to Adopt New Safety and Reliability Regulations for Natural Gas Transmission and Distribution Pipelines and Related Ratemaking Mechanisms (Rulemaking (R.) 11-02-019).

None of the communications that were noticed on October 6, 2014, concern this proceeding.

The Law and Motion hearing on this matter was held on October 7, 2014 concerning only the disclosures in the September 15, 2014 Notice of PG&E. The ruling of the Law and Motion Administrative Law Judge in this matter was issued October 16, 2014 and concurrently referred to the full Commission for review. This decision modifies the October 16, 2014 ruling imposing sanctions for violations of *ex parte* rules and adopts further sanctions and remedies.

## **Discussion**

The September 17, 2014 ruling initiating this portion of the proceeding ordered PG&E to appear and show cause why it should not be found in contempt for violations related to PG&E's January 2014 e-mails and associated oral communications concerning the assignment of an Administrative Law Judge to this proceeding.<sup>2</sup> There is no dispute that PG&E's January 2014 e-mail

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<sup>2</sup> While the evidence that PG&E provided regarding additional *ex parte* violations informs this matter, due process restricts the Commission from imposing sanctions at this juncture for violations that were not noticed in the order to show cause. See, e.g., 2014 California Rules of

correspondence constituted inappropriate *ex parte* communications regarding the assignment of a proceeding to a particular Administrative Law Judge and reassignment of a proceeding to another Administrative Law Judge in violation of Rule 8.3(f). TURN and San Bruno count 17 separate *ex parte* communications, which is not disputed by any other parties. By our count, however, there were 23 separate e-mails initiated by PG&E, 20 of which directly relate to or mention the assignment of the Administrative Law Judge, in violation of Rule 8.3(f), which completely prohibits any *ex parte* communications on the subject of the assignment of administrative law judges.

In addition, the content and tone of PG&E's e-mails, taken together, show disrespect for the Commission and its administrative law judges in general, which we also count here as a single violation of Rule 1.1. As for determining the appropriate sanction for these violations, we generally apply the Commission's established principles used in assessing sanctions as set forth in the Affiliate Rulemaking Decision, Decision (D.) 98-12-075:

- What harm was caused by virtue of the violation?
- What was the utility's conduct in preventing, detecting, correcting, disclosing, and rectifying the violation?
- What amount of fine or penalty will achieve the objective of deterrence based on the utility's financial resources?

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Court, Rule 2.30(c), "[...] The court on its own motion may issue an order to show cause that must (1) state the applicable rule that has been violated, (2) describe the specific conduct that appears to have violated the rule, and (3) direct the attorney, law firm, party, witness, or other person to show cause why sanctions should not be imposed against them for violation of the rule." (Emphasis added.) While the California Rules of Court do not govern, they are instructive.

- What fine/penalty or sanction has the Commission imposed under reasonably comparable factual circumstances? And,
- Under the totality of circumstances, and evaluating the harm from the perspective of the public interest, what is the appropriate fine/penalty or sanction?

### **1. Harm caused**

Violations which harm the integrity of the regulatory process by “disregarding a statutory or Commission directive, regardless of the effects on the public, will be accorded a high level of severity.” (See D.98-12-075 at 36.) PG&E’s actions severely harmed the integrity of the regulatory process.

It is not merely the fact that PG&E violated an *ex parte* rule, although that is serious enough; the very purpose of the *ex parte* rules is to ensure the integrity of the regulatory process by providing a level playing field and transparency, and PG&E’s illegal *ex parte* communications thwart these purposes.

However, while other illegal *ex parte* communications taint the regulatory process by attempting to improperly influence an individual commissioner or by attempting to influence an individual Commissioner without affording other parties notice and opportunity to do the same, *ex parte* attempts to circumvent Rule 9.2 of the Commission’s Rules of Practice and Procedure, which allows for a peremptory challenge to the assigned Administrative Law Judge, potentially compromises the integrity of the entire record of a proceeding.<sup>3</sup>

Administrative Law Judges are charged with the responsibility for developing the record of the proceeding. The insinuation that an Administrative

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<sup>3</sup> Parties have the right to formally move, by filed motion on the record of the proceeding, for reassignment of an Administrative Law Judge on peremptory challenge. Rule 9.2. This is the appropriate manner in which to request a formal reassignment to another Administrative Law Judge.



Law Judge might be assigned to a particular proceeding by virtue of being biased or lacking judicial independence compromises the entire record and calls into question the integrity of any outcome, however appropriately reached.

Furthermore, PG&E's *ex parte* communications in this matter show disrespect for the Commission and its judges. Pursuant to Government Code § 11475, and unique among the Commission and its staff, the Commission's Administrative Law Judges are subject to the California Code of Judicial Ethics and, among other things, required to uphold the integrity and independence of the judiciary, and to perform their duties impartially.<sup>4</sup> PG&E's cavalier insinuations that the Commission's judges fail to uphold the judicial canons is inappropriate and disrespectful in violation of Rule 1.1.<sup>5</sup>

The harm from PG&E's *ex parte* violations here is also not limited to the regulatory process or the Commission's Administrative Law Judges. As a consequence of PG&E's actions, and in order to restore confidence in the fairness and independence of the record in this proceeding (though there was no evidence of bias shown by the previous assigned Administrative Law Judge), the Chief Administrative Law Judge felt it necessary to reassign this case to a new judge and suspend the evidentiary hearings that were scheduled to begin in October 2014. As a direct consequence of PG&E's actions, the final decision in

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<sup>4</sup> See, e.g., Canon 1, "A judge shall uphold the integrity and independence of the judiciary," and Canon 3, "A judge shall perform the duties of judicial office impartially and diligently."

<sup>5</sup> Rule 1.1. Ethics. Any person who signs a pleading or brief, enters an appearance, offers testimony at a hearing, or transacts business with the Commission, by such act represents that he or she is authorized to do so and agrees to comply with the laws of this State; *to maintain the respect due to the Commission, members of the Commission and its Administrative Law Judges*; and never to mislead the Commission or its staff by an artifice or false statement of fact or law. (CCR, Title 20, Ch. 1, Section 1.1, emphasis added.)

this case has been delayed from the original anticipated date of March 2015 to a new anticipated date of August 2015.<sup>6</sup>

If there is any additional revenue authorized as a result of a final decision in this case, the period of time over which those revenues will be collected will be shortened by five months as a direct result of the delays caused by PG&E's actions at issue here. Though the delay will not change the overall amount of revenues authorized, collecting those revenues over a shorter period of time during the rate case period will cause the rate at which the revenues are collected to be higher, all else being equal. This potential increased rate impact on ratepayers is another form of harm created by PG&E's actions, and that harm is potentially significant. PG&E's interests in collecting the potential revenues authorized by this proceeding are protected by the Commission authorizing, prior to the e-mail disclosures that are the subject of today's decision, in D.14-06-012, January 1, 2015 as the effective date for PG&E's revenue requirement in this proceeding. Ratepayer interests are not similarly protected from any changes in regulatory schedule that result from PG&E's actions at issue here.

## **2. PG&E's conduct**

The Commission has held that:

A penalty must take into account the scope of a utility's investigatory efforts, level of self-reporting and cooperation, and corrective measures, to avoid the unintended consequence of discouraging such behavior in the future, for the utility being penalized as well as other utilities. We expect and demand cooperation and will reward it appropriately. (D.08-09-038 at 108.)

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<sup>6</sup> November 13, 2014 *Ruling of the Assigned Commissioner and Administrative Law Judge Amending Scoping Memo and Schedule*.

PG&E requests that, in imposing a penalty for its violations, we take into account how it identified, disclosed, and addressed the violations.

PG&E maintains that it voluntarily undertook a self-initiated review of years of communication with the Commission and, upon encountering the e-mails that are the subject of the order to show cause, it self-reported these violations and took swift action to make significant changes that are designed to prevent this from ever happening again: First, it discharged its Vice President of Regulatory Affairs (who engaged in the improper communications), his supervising Senior Vice President of Regulatory Affairs, and his associate Vice President of Regulatory Proceedings and Rates. Second, it named a new Senior Vice President of Regulatory Affairs and reconfigured the chain of authority to have that person report directly to PG&E's president. Third, PG&E intends to create the new role of chief regulatory compliance officer, whose mandate will be to help oversee compliance with all requirements governing PG&E's interactions with the CPUC; the position will report to PG&E's Chief Executive Officer and to the Audit Committee of PG&E Corporation's Board of Directors. Fourth, PG&E engaged Ken Salazar, an attorney with a resume that includes several state and federal governmental positions, as special counsel on regulatory compliance matters to assist in developing a "best-in-class regulatory compliance model." Fifth, PG&E intends to implement additional, mandatory training for all employees who routinely interact with PG&E's regulators.

TURN takes exception to PG&E's characterization of its response as swift: TURN contends that PG&E did not reveal its improper *ex parte* communications on the subject of the judge assignment immediately as they claim:

You don't take these steps: You dismiss three officers; you hire Ken Salazar; you do all these other things in a manner of moments after discovering, whatever that means, these e-mails. They took their time; they got their ducks in a row; they figured out how to hire Ken Salazar, who is going to provide them political cover for all of this. And then they decided to let the rest of us in on their secret. That is what happened here. That is not acting swiftly. That is making sure you get your damage control. You consider all the PR. You get that all squared away, and then you let us know. That is not swift. That is putting the company's interest ahead of the public interest. (Reporters' Transcript (RT) Volume 11, at 732-733.)

TURN's point is well-taken, particularly here in the context of inappropriate *ex parte* contact about the assignment of the Administrative Law Judge in an open proceeding, where earlier reporting would have allowed the Commission to take action sooner with respect to the reassignment of the Administrative Law Judge.

However, we do acknowledge PG&E's voluntary disclosure of the violations and its announced steps to improve compliance with our rules going forward.

### **3. Commission precedent**

Commission precedent in sanctioning *ex parte* violations has ranged from imposing relatively minor fines, or none at all, to requiring training on ethics and the Commission's *ex parte* rules, to mere admonishments.

Where two utilities in an adjudicatory proceeding violated the ban against *ex parte* communications by participating in two separate *ex parte* meetings, each with two Commissioners' advisors, the Commission fined them each \$20,000 per meeting. (D.07-07-020 as modified by D.08-06-023 [Cox Communications and SBC Communications].)

Where one utility violated the ban on *ex parte* communications after the conduct of a ratesetting deliberative meeting by sending a letter to five Commissioners and six of their advisors (which the Commission counted as 11 violations), and another by leaving a voicemail for a Commissioner's advisor, the Commission fined them \$2000 and \$1000, respectively, per violation.

(D.02-12-003 [AT&T Communications and WorldCom, Inc.] )

In an adjudicatory proceeding in which a party sent a written *ex parte* communication to all Commissioners (and concurrently served it on all parties), the Administrative Law Judge chastised the party and no penalty was imposed. (May 3, 2002, Administrative Law Judge's Ruling, I.00-11-052 [Qwest Communications].)

In a ratesetting proceeding in which the utility failed to report its *ex parte* communications with each of the Commissioners' energy advisors, the Administrative Law Judge required the utility to file notice of its *ex parte* communications and to retain an independent firm, at its shareholders' expense, to conduct four training sessions on Rule 1.1 and Article 8 of the Rules of Practice and Procedure, and no penalty was imposed. (February 16, 2012, Joint Assigned Commissioner and Administrative Law Judge's Ruling, A.08-05-022 et al. [Southern California Gas Company].)

Finally, in a ratesetting proceeding in which PG&E met with two Commissioners and their advisors without providing the requisite three-day advance notice of the grant of the individual meetings with the Commissioners or post-meeting notices of the *ex parte* communications, PG&E was required to develop and institute a control system which reflects best practices for compliance with the *ex parte* rules, and no penalty was imposed. (D.08-01-021 [PG&E].)

In addition, there is Commission precedent for imposing enhanced restrictions on *ex parte* and other communications in response to actual or alleged *ex parte* violations. (See, e.g., September 25, 2014, Ruling Granting Motion for a Ruling Suspending the Procedural Schedule and Other Relief and Imposing an Ex Parte Communications Ban, A.13-12-012/I.14-06-016, and September 24, 2014, Administrative Law Judges' Ruling Granting Motion for One Day Notice of All Communications, I.12-01-007, I.11-02-016, and I.11-11-009.)

#### **4. Deterrence Value Based on the Utility's Financial Resources**

Pub. Util. Code §2107 provides that, in a case in which a penalty has not otherwise been provided, a public utility is subject to a penalty of not less than \$500 and not more than \$50,000 for each offense. Thus, the maximum penalty under Public Utilities Code §2107 for the 20 *ex parte* violations of Rule 8.3(f) we count is \$1,000,000, with an additional \$50,000 penalty for the single violation of Rule 1.1 discussed above, resulting in a total penalty of \$1,050,000.

Given PG&E's financial resources, the deterrence value of such a penalty is, on its own, small.

As the Commission previously remarked when it declined to impose a penalty for PG&E's prior *ex parte* violation,

In terms of financial resources, PG&E is an extremely large company with ownership equity in the billions. The penalty range of \$500 to \$20,000 per transaction<sup>7</sup> is a small sum for any deterrence value – if deterrence means avoiding the financial harm of the penalty. We could therefore impose the maximum penalty with little likelihood of a discernable financial impact on PG&E." (D.08-01-021 at 14.)

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<sup>7</sup> Pub. Util. Code § 2107 has since been amended to increase the maximum penalty to \$50,000 per transaction.

San Bruno and UET share the Commission's earlier observation in this case. As San Bruno states:

Punishment of wrongdoing serves as a means to deter future bad acts, but this concept has long been a challenge when the wrongdoer is a corporation: a legal fiction, who has "no soul to be damned, and no body to be kicked." A wrist slap of monetary sanction is what PG&E expects; it wants to pay the anticipated Commission's fine, move ahead with its request to increase rates for consumers, and continue with its business as usual. (San Bruno response at 1, citation omitted.)

And, as UET states:

Indeed, a rational decision-maker in PG&E's position might logically choose to risk imposition of a \$12 million fine in order to secure an additional \$4 billion in revenue, especially given that such fines represent less than 15% of a single month's profit. (UET response at 9.)

TURN responds that, "[o]nce the sanctions reach a level that becomes material, even a large company like PG&E, they have to report the prospect of those sanctions to their investors through the Securities and Exchange Commission. And I strongly believe that those sanctions get their attention." (RT at 728.)

TURN also contends that PG&E's "concealment" of these improper communications was a continuing violation such that each day since the communications and ending with the filing of the PG&E notice on September 15, 2014, constitutes as separate and distinct offense pursuant to Pub. Util. Code § 2108; on this basis TURN counts 4,080 offenses and calculates a maximum penalty of \$204 million for the identified *ex parte* violations. As precedent for calculating the penalty in this manner, TURN cites to D.13-12-053, in which the Commission imposed a monetary penalty as sanction for PG&E's failure to

promptly correct misstatements in a filing before the Commission, and calculated the penalty based on the number of days between PG&E's discovery of its misstatement and its reporting of it to the Commission.

The factual circumstances of D.13-12-053 are not reasonably comparable to the circumstances of the order to show cause in this proceeding. The violation at issue in that matter was not an *ex parte* violation. Rather, it concerned the utility's (PG&E) failure to promptly and transparently correct its material misstatements regarding the features of its pipeline Line 147, which supported a Maximum Allowable Operating Pressure of 365 pounds per square inch gauge (psig), as approved in D.11-12-048, when the features only support 330 psig. The harm of such violation was not only to the integrity of the regulatory process, but potentially to the public's safety.

Thus, Commission precedent does not support considering PG&E's e-mail *ex parte* violations as continuing violations.

We do, however, believe that a penalty for the 20 violations of Rule 8.3(f) and the single violation of Rule 1.1, at the maximum amount per violation, for a total of \$1,050,000, will create a modicum of deterrence value, especially when taken together with the other sanctions and remedies discussed further below.

TURN also proposes that, in addition to any monetary penalties and other sanctions that may be imposed, the Commission require PG&E to refund the \$21.5 million of Regulatory Relations costs approved for 2014 in its 2014 General Rate Case decision, D.14-08-032. TURN does not cite to any precedent for imposing such a sanction for violation of the *ex parte* rules, and we are not aware of any. While it may appear perhaps superficially appealing to eliminate funding for the department from which the *ex parte* violations occurred, it is not apparent that reduced regulatory compliance funding will facilitate



improvement in compliance with Commission rules. Thus, we reject this proposal.

However, this proposal by TURN is the only one that reflects in any way our concern, discussed in the section related to “harm caused” above, that there is the potential for ratepayer harm from PG&E’s conduct designed to influence the assignment of the judge in this case. The delay caused by PG&E’s actions, and the associated inquiry and judge reassignment, has potentially real impacts on rates charged to customers.

In reparation for this fact, as a ratemaking remedy designed to place responsibility and cost of delay appropriately and deter such behavior by PG&E in the future, we intend to make certain ratemaking adjustments when the revenue requirements authorized in this proceeding are finalized by the Commission at the conclusion of this proceeding. This ratemaking remedy will be in the form of a disallowance, to be covered by PG&E shareholders, of a significant portion of the ratepayer costs that would have been amortized over the period between the original expected Commission decision date of March 2015 and the date that a decision is now scheduled for August 2015 in the most recent Scoping Memo issued November 13, 2014.

The amount of the ratemaking disallowance is to be calculated at a maximum of all of the revenues, as authorized in a final Commission decision in this proceeding, that would have been amortized (collected from ratepayers) during the five-month period of the delay.

Though the final amount of the ratemaking disallowance will be calculated at the time the total revenues for this proceeding are approved, the amount is likely to be significant enough to have a deterrent effect on similar behavior by PG&E in the future. In addition, this level of sanction and ratepayer reparation is

one that is more commensurate with the company's financial ability to absorb, and, as stated above, places responsibility on the party causing the delay and ratepayer impact. If there are further delays as a result of the regulatory process after issuance of this decision, PG&E shareholders will not be held responsible for any such future delays unless they are specifically shown to be caused by any further inappropriate or illegal actions by the company.

TURN (supported by the Office of Ratepayer Advocates) and San Bruno also propose various non-monetary sanctions, particularly in the form of bans on otherwise permitted *ex parte* communications, as well as reporting requirements for non-*ex parte* communications. While some of the particulars proposed by the parties are extraneous, imposing additional *ex parte* restrictions should undoubtedly capture PG&E's and other parties' attention: parties' and especially large utilities' ability to influence decision makers outside of the formal record of a proceeding is invaluable, and depriving a party of the privilege clearly demonstrates zero tolerance of its abuse.

## **5. Totality of Circumstances**

There are factors in addition to those discussed above that unavoidably inform this matter.

As to PG&E's conduct, these violations follow PG&E's previous *ex parte* violations and its past commitment, in remedy, to develop and implement a "best-in-class regulatory compliance model" for ensuring compliance with the *ex parte* rules (D.08-01-021, *supra*), to no apparent avail.

Also relevant is the very regrettable fact that PG&E's violations of the prohibition on *ex parte* communications related to the assignment of Administrative Law Judges were aided by a Commissioner's advisor and two Commissioners, two of whom actively engaged in the activity and the other who

did not appear to object to it. However, the Commissioners' and staff's involvement does not absolve PG&E of its ultimate responsibility for complying with our rules.

San Bruno and TURN allege that other communications that have been disclosed provide evidence of an inappropriate relationship between PG&E and the Commission beyond the violations of the *ex parte* rules cited in the order to show cause ruling here and disclosed by PG&E, and seek an order that PG&E produce the 65,000 e-mails that is identified in its internal review of communications with the Commission since early 2010. Otherwise, TURN bluntly states, "it looks like the Commission is hiding something that it does not want the public to know" (TURN response at 8) and, "Well, there's a restriction on -- frankly, there's a restriction in the law on public corruption, your Honor. And public corruption involves quid pro quo giving away ratepayer money or promising ratepayer money in exchange for getting promises from a utility to do what a regulator wants. [...] And both parties are subject to whatever appropriate sanctions should follow from engaging in that behavior" (RT at 726-727).

These are serious allegations, and they deserve serious attention by Commission. However, the investigation of the Commission's own conduct, as well as PG&E's in other proceedings or even in this proceeding beyond the disclosures of September 15, 2014, is beyond the scope of this order to show cause. They do not factor in the totality of circumstances for sanctions and remedies in this particular order to show cause issued September 17, 2014 in this proceeding, though that does not preclude the Commission's addressing them elsewhere, as appropriate. The request of San Bruno and TURN for further discovery of additional emails and *ex parte* contacts mentioned in PG&E's

September 15, 2014 Notice, in addition to those specifically disclosed therein, will also be addressed separately in this proceeding.

## **6. Other Requests by Parties**

TURN (and perhaps implicitly San Bruno) also proposes that PG&E be required to report communications regarding its gas transmission or storage operations and communications regarding its financial condition, regardless of whether PG&E deems them to be related to a particular proceeding. The question of whether the communications regarding a utility's financial condition and condition of its system are *ex parte* communications is at issue in San Bruno's July 28, 2014, motion now pending before the Administrative Law Judges in I.12-01-007, I.11-02-016, and I.11-11-009, and therefore we do not address it here. TURN may resubmit its proposal after that matter is resolved.

San Bruno proposes that, in addition to other sanctions that may be imposed, the Commission ban PG&E from funding California Funding for the Environment and the Economy (CFEE). San Bruno notes that CFEE pays for government officials' travel to "fancy international conferences in attractive international destinations," and contends that this feeds PG&E's "cozy, informal relationship with the CPUC." (San Bruno response at 9.) San Bruno does not identify any law that PG&E violates by virtue of its funding of CFEE, and its proposal raise, at first blush, significant First Amendment issues. The record does not support San Bruno's proposal.

San Bruno proposes that, in addition to other sanctions that may be imposed, the Commission order PG&E to provide ethical training to its employees and executives, as well as to Commissioners and their staff; San Bruno recommends that both trainings be conducted by an outside consultant specializing in ethics, and also that PG&E be ordered to hire an

independent ethics monitor to ensure compliance with Rule 1.1 and the *ex parte* rules.

We are not persuaded of the benefit or appropriateness of this proposal. The *ex parte* rules are not complicated, and neither are the ethical considerations of due process, transparency and level playing field in government, and the obligation to avoid breaking the law.

As for training for the Commission and its advisors, the Commission has ample in-house expertise on these issues and does not require an outside independent consultant to advise it on its own regulations. However, we are engaging in additional training of our employees on these rules.

Finally, UET proposes that the Commission dismiss this application, and require PG&E to re-file and go through the process that the case should have gone through from the beginning. (RT at 734.) This proposal serves no apparent purpose, would delay further our consideration of the substantive issues in this case, and is therefore rejected.

## **7. Details of *Ex Parte* Sanctions of PG&E**

For a one-year period or until the resolution of this proceeding (whichever is later), PG&E is banned from engaging in *ex parte* communications with Commissioners or their advisors other than in all-party meetings, and from communicating with Commissioners or their advisors regarding procedural matters, and shall report its communications with Commission advisory staff, as discussed more fully below. This penalty is severe in that it deprives PG&E of the incalculable benefits of being able to privately attempt to influence Commissioner votes outside of public meetings, and it allows PG&E – and, indeed, this Commission as well -- time to re-evaluate the critical importance of

the *ex parte* rules and to promote internal culture change to that effect within our organizations.

A ban on otherwise permissible *ex parte* communications unavoidably deprives Commissioners and their advisors of the benefit of such communications, including those who are in no way implicated in the violations at issue. However, this drawback is mitigated by allowing PG&E to continue to communicate with Commissioners and their advisors in otherwise permissible all-party *ex parte* meetings. On balance, the critical public interest in restoring the integrity of the Commission's regulatory process outweighs this limitation.

The effectiveness of this sanction, as with the effectiveness of all of our *ex parte* rules, ultimately depends on the knowledgeable and good faith efforts of the parties on both sides of the communications, by the communicators to abide by them, and by the recipients of the communications to enforce them. The sanction is, at least, designed to be simple to follow and for violations to be simple to detect.

**a. Duration**

The restrictions are imposed for a one-year period from the effective date of this decision for all ratesetting and adjudicatory proceedings other than this one. For this proceeding, the restrictions will be in place until the resolution<sup>8</sup> of this proceeding.

**b. Affected Parties**

The restrictions apply to PG&E.

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<sup>8</sup> Consistent with Rule 8.3(g), the requirements of this ruling shall apply until (1) the date when the Commission serves the decision finally resolving any application for rehearing, or (2) where the period to apply for rehearing has expired and no application for rehearing has been filed.

San Bruno proposes a ban on *ex parte* communications for all parties, not just PG&E. That proposal is rejected. Our *ex parte* rules are the product of Senate Bill 960 (Stats. 1999, Ch. 1005, Sec. 55.), which was developed with the broad participation of this Commission, regulated utilities, ratepayer groups, and other interested entities, and we will not overhaul them here by way of a decision sanctioning PG&E. In any event, the behavior at issue in this matter is PG&E's, and banning other parties from engaging in otherwise permissible *ex parte* communications would not serve to either punish nor rehabilitate PG&E's conduct.

We note that a September 25, 2014 Ruling of the acting Chief Administrative Law Judge imposed *ex parte* restrictions on all parties in this proceeding, and an October 10, 2014 motion of Commercial Energy in this proceeding requests that those restrictions be lifted. Those matters have been addressed separately and are not affected or modified by this decision or by the October 16, 2014 Law and Motion Judge's Ruling.

### **c. Scope of Proceedings**

The restrictions apply to all formal adjudicatory and ratesetting proceedings.

TURN proposes that a ban on PG&E's *ex parte* communications extend to quasi-legislative proceedings as well.<sup>9</sup> That proposal is rejected. Pursuant to Pub. Util. Code § 1701.4(b) and Rule 8.3(a), which govern *ex parte* restrictions in quasi-legislative proceedings, *ex parte* communications are permitted without

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<sup>9</sup> Pursuant to Pub. Util. Code §§ 1701.1 et seq., *ex parte* communications are banned in proceedings that have been categorized as "adjudicatory," they are permitted with certain restrictions and reporting requirements in proceedings that have been categorized as "ratesetting," and they are permitted without restriction or reporting requirement in proceedings that have been categorized as "quasi-legislative."

restriction. As it is not possible to violate this *ex parte* rule, banning such communications is unreasonable.

TURN explains its reasoning that, even if communications concerning quasi-legislative proceedings do not violate *ex parte* rules, they may violate laws against public corruption. As discussed previously, allegations and remedies for alleged wrongful conduct by the Commission is beyond the scope of this order to show cause in this proceeding. (RT at 726-727.)

#### **d. Form of Ex Parte Communications**

The ban on *ex parte* communications extends to oral and written *ex parte* communications with Commissioners and their advisors. PG&E is permitted to participate in otherwise permissible all-party meetings.

San Bruno proposes that the *ex parte* ban extend to such all-party meetings. That proposal is rejected. All-party meetings afford transparency and a level playing field. In addition, allowing PG&E to engage in them mitigates the detriment to Commissioners and their advisors of being deprived of the benefit of individual *ex parte* communications that are otherwise allowed by statute and rule.

Granted, Rule 8.3(c)(3)'s requirement that written *ex parte* communications be concurrently served on the official service list affords the same transparency as an all-party meeting. However, PG&E's evidence shows repeated failure to concurrently serve or otherwise report its written *ex parte* communications. Furthermore, unlike the all-party meetings requirement, the concurrent service requirement for written communications is not self-enforcing and it is not automatically apparent to other parties when the reporting requirement has been violated.



**e. Restrictions on Procedural Communications**

TURN and San Bruno propose that PG&E be required to provide one-day notice of any communications regarding Commission proceedings that PG&E considers to fall outside of the definition of “*ex parte* communication,” including communications that PG&E deems to be nonsubstantive procedural communications. A variation on this proposal is adopted.

As parties’ use of the term reflects, there appears to be confusion as to whether a procedural communications constitute *ex parte* communications. While Rule 8.1(c) clarifies that procedural “inquiries” as to the schedule, location, or format for hearing, filing dates, identify of parties and other such nonsubstantive information are not *ex parte* communications, it may be difficult for parties to discern between a procedural “inquiry” that merely seeks information and a procedural request for Commission action that is substantive in nature. In any event, to the extent that procedural communications are nonsubstantive, there is no cause to direct them to Commissioners or their advisors; the Commission’s Administrative Law Judges are best suited to address them and are trained and experienced in fielding procedural requests and adept at discerning when they rise to the level of *ex parte* communications that require notice and reporting.

In order to avoid PG&E’s inadvertent but inappropriate *ex parte* communications regarding procedural matters, PG&E is prohibited from engaging in procedural communications with Commissioners and their advisors during the pendency of this sanction. PG&E may direct any such communications to the assigned Administrative Law Judge or, if none is assigned, to the Chief Administrative Law Judge.

**f. Reporting of Communications with Commission Senior Management**

TURN and San Bruno propose that PG&E be required to provide one-day notice of any communications regarding pending issues in open proceedings with the Commission's advisory staff including the General Counsel, the Executive Director, Deputy Executive Director and Division Directors, and all advisory staff, as was ordered by the Administrative Law Judge in the Line 132 investigations. (September 24, 2014, Administrative Law Judge's Ruling, I.12-01-007, I.11-02-016, and I.11-11-009.) In that ruling, the Administrative Law Judge states that the disclosures of *ex parte* violations in PG&E's September 15, 2014 Notice in this case highlight the need for additional safeguards to ensure the integrity of those investigations. This safeguard is likewise appropriate in this proceeding that was directly affected by PG&E's violation, as well as all proceedings within the scope of this sanction.

It is adopted for the same one-year period for all other proceedings and for the pendency of this proceeding, with two minor modifications. We will adopt the reporting requirement for communications with the Commission's senior management including the General Counsel, Executive Director, Deputy Executive Directors, Division Directors, and Deputy Division Directors, but will not extend this requirement to all advisory staff below that level, to avoid interfering with staff analysis and data gathering on the underlying facts of this and other affected ratesetting cases.

Whether intentional or not, application of a reporting requirement to all advisory staff at all levels has at least the potential practical effect of reducing PG&E's willingness to communicate with staff, which in turn thwarts the ability of Commission staff to do the appropriate analysis required to fulfill their job

functions. San Bruno, TURN, and ORA also seem to assume in their arguments that advisory staff are intentionally or inadvertently acting as conduits to decision makers with information from PG&E. We have not found this to be the case, and therefore do not find it necessary to require reporting of staff contacts below the senior management level.

Second, for practical reasons requested by PG&E, we modify the reporting requirement for PG&E to disclose within three days (instead of one day) any contacts with the above-named senior management of the Commission, similar to the three-day requirement for reporting of contacts with decision makers currently in the Commission's Rules.

### **Comments on the Proposed Decision**

The alternate proposed decision of Commissioner Peterman in this matter was mailed to the parties in accordance with Section 311 of the Public Utilities Code and comments were allowed under Rule 14.3 of the Commission's Rules of Practice and Procedure. Comments were filed on November 5, 2014 by the City of San Bruno, the Northern California Generation Coalition, ORA, PG&E, and TURN. Reply comments were filed on November 10, 2014 by the City of San Bruno, ORA, PG&E, and TURN.

First, PG&E argues that the proposed ratemaking disallowance in this alternate exceeds the Commission's penalty authority and amounts to an additional penalty, rather than compensation to customers. We disagree. It is directly within our regulatory authority over rates to govern the means by which PG&E's customers compensate the company for its costs. Likewise, it is within our authority to determine ratemaking remedies when actions of the company create ratepayer impacts that are unjust and unreasonable. Unlike the penalty ordered in this decision, which is payable to the State's General Fund under the

provisions of Section 2107, the ratemaking remedy is not a penalty and is instead a “reparation” as correctly argued by TURN in its comments. The ratemaking remedy is meant to address the adverse effect on ratepayers of PG&E’s actions.

PG&E also generally argues that the *ex parte* ban is unnecessary, overbroad, and impractical. We do not agree that the ban is unnecessary, but do make modifications to the decision to address the breadth and practicality of the ban, by limiting the ban to one year in all other ratemaking and adjudicating proceedings, but leaving the ban in place for the length of this proceeding, including the pendency of any rehearing applications. In addition, the reporting requirement for contact with senior management in such proceedings is revised to three days instead of one day.

PG&E also argues that the *ex parte* ban commits legal error by depriving PG&E of its rights under Pub. Util. Code Sec. 1701.3(c) which provides that “[i]f an *ex parte* communication meeting is granted to any party, all other parties shall also be granted individual *ex parte* meetings of a substantially equal period time.” While PG&E may be generally entitled to this privilege under this exception to the otherwise impermissible *ex parte* contact in ratesetting proceedings, this right is not absolute, particularly when their violations of this same statutory section are at issue here. After being convicted of illegal activity, incarcerated individuals are deprived of certain rights to which they would otherwise be entitled; in an analogous manner, we are intentionally depriving PG&E in this decision of certain rights to which it would otherwise be entitled because of their previous violations of these rules. This deprivation is only for a period of time as specified, after which their privileges under the statute will be reinstated as described herein.

TURN takes issue with the alternate proposed decision's reference to PG&E counsel's statement that PG&E has taken actions that are "as strong a remedy as the company could take internally" and also its reference to PG&E counsel's claims about when and how PG&E learned of the Rule violations. We agree with TURN that these are not established and tested facts and have removed those references from this decision. These findings also were not necessary to reach the conclusions in this decision.

In addition, both TURN and ORA argue that PG&E's voluntary disclosure of the inappropriate *ex parte* contacts and its subsequent actions, as well as the involvement of Commission personnel, are not enough to justify mitigating the amount of the ratemaking remedy ordered in this decision by one-half. Upon further consideration, we agree with TURN and ORA and have amended this decision to allow for the amount of the ratemaking remedy not to exceed the total amount of funding amortized over the five-month delay in this proceeding caused by PG&E's actions at issue here. The final amount of the ratemaking remedy will be addressed in the final decision in this proceeding.

Both TURN and ORA continue to argue that the violations of Rules 8.3(f) and 1.1 constitute continuing violations under Section 2108. TURN charges legal error by citing the fact that this interpretation results in only a small maximum penalty as compared to interpreting each day of concealment as a separate offense. This truism does not demonstrate legal error. ORA charges legal error because the alternate proposed decision mistakenly cites to Pub. Util. Code Section 2109, a typographical error which we have corrected, and because it does not explain why it reaches its conclusion. Our findings herein only establish that PG&E's January emails violate the prohibition on *ex parte* contacts related to assignment of administrative law judges. Though the effects of PG&E's

violations were continuing until disclosed, the actual violations were not. This is analogous to an assault conviction; though the victim's suffering from injuries may continue for a period of time, there was still only one assault in violation of the law.

TURN, San Bruno, and ORA also argue that the September 17, 2014 Order to Show Cause Ruling and subsequent hearing on October 7, 2014 inappropriately circumscribe the scope of these decisions to only those admitted violations of the rules contained in PG&E's September 15, 2014 Notice. We have amended parts of this decision to address this contention and to clarify that although this decision addresses only those violations disclosed in the September 15, 2014 Notice and the October 7, 2014 hearing, nothing in this decision limits the ability of parties to request additional discovery in this or any other proceeding. The Commission is similarly not limited in its ability to impose additional sanctions for any other violations of Rules or Law that are established in the future.

Other comments by parties fail to identify legal error and therefore are not addressed further here.

### **Assignment of Proceeding**

Carla Peterman is the assigned Commissioner and Amy Yip-Kikugawa is the assigned Administrative Law Judge in these proceedings. Hallie Yacknin is the assigned Administrative Law Judge on this Law and Motion matter.

### **Findings of Fact**

1. PG&E engaged in at least 20 *ex parte* communications with Commissioners or a Commissioner's advisor regarding the assignment of this proceeding to a

particular Administrative Law Judge, as reported in PG&E's September 14, 2014, Notice of Improper Ex Parte Communications, in violation of Rule 8.3(f).

2. PG&E, through its improper *ex parte* communications regarding the judge assignment in this proceeding, showed disrespect in violation of Rule 1.1.

3. These *ex parte* violations follow PG&E's previous *ex parte* violations and its past commitment, in remedy, to develop and implement a "best-in-class regulatory compliance model" for ensuring compliance with the *ex parte* rules, as addressed in D.08-01-021.

4. PG&E's violations severely harmed the integrity of the regulatory process.

5. PG&E's violations also have the potential to harm ratepayers in this case by requiring any revenue eventually authorized to be collected over a shorter amortization period than would have otherwise occurred, due to the necessary delays caused by PG&E's actions leading to the reassignment of the Administrative Law Judge in this case.

6. PG&E's request for an increased revenue requirement to be addressed in this proceeding is protected by D.14-06-012, which authorizes January 1, 2015 as the effective date of any increased revenue requirement authorized; ratepayer interests are not similarly protected from delays flowing directly from PG&E's *ex parte* violations with respect to this case.

7. PG&E has undertaken several actions internally in detecting, correcting, disclosing, and rectifying the violations and proposing means to prevent future violations.

8. PG&E did not immediately inform the Commission and parties after discovery of the e-mails violating Rule 8.3(f).

9. The appropriate penalty amount under Section 2107 is \$1,000,000, calculated at \$50,000 each for a total of 20 violations of Rule 8.3(f) and an

additional \$50,000 for a single violation of Rule 1.1, resulting in a total penalty of \$1,050,000.

10. Parties' and especially large utilities' ability to attempt to influence decision makers outside of the formal record of a proceeding via *ex parte* communications is invaluable, and depriving a party of the privilege of even otherwise permissible contacts is an appropriate sanction for the undisputed violations disclosed in the September 15, 2014 Notice of PG&E.

### **Conclusions of Law**

1. The penalty under Pub. Util. Code § 2107 of \$1,050,000, taken together with the other remedies ordered herein, should have deterrence value in preventing PG&E from repeating abuses of the *ex parte* prohibitions.

2. An *ex parte* communication in violation of an *ex parte* ban does not give rise to a continuing offense pursuant to Pub. Util. Code § 2108.

3. TURN's proposal to require PG&E to refund one year's worth of regulatory relations costs, though it would provide a ratepayer benefit, shows no clear nexus with *ex parte* rule compliance in the future and should be rejected.

4. Ratepayers deserve appropriate consideration and reparations emanating from the potential for increased amortization of revenue requirement increases because of the delay caused in this proceeding by PG&E's actions that led to the reassignment of the Administrative Law Judge.

5. PG&E's shareholder should fund a ratemaking disallowance in reparation to ratepayers of a significant portion of the revenue requirement that would have been collected during the five-month delay in this proceeding caused by PG&E's actions.



6. The exact amount of the disallowance to be covered by shareholders should be resolved in the final decision resolving this proceeding, in accordance with the guidance given in this decision.

7. Aid offered to PG&E during the course of its violations by Commissioners and staff does not absolve PG&E of responsibility for its own actions.

8. PG&E *ex parte* and procedural contacts should be restricted for one year for all ratesetting and adjudicatory proceedings, and until the final resolution of this case, except for contact in all party meetings.

9. PG&E should be required to report all contacts with Commission senior management named herein just as they are required to report those contacts with decision makers according to the *ex parte* rules, within three days. PG&E should not be required to report interactions with other Commission advisory staff below the senior management level described herein.

10. This Commission proceeding is not the appropriate forum for investigating allegations of wrongful conduct by the Commission. Parties have the right to seek information regarding such matters pursuant to the Public Records Act and to pursue appropriate recourse in other forums.

11. San Bruno's and TURN's request for an order directing PG&E to produce the 65,000 e-mails referenced in PG&E's September 15, 2014 Notice and to allow parties broad discovering regarding those and other PG&E communications with the Commission is being addressed elsewhere in this proceeding.

12. San Bruno's proposal to ban PG&E from funding the California Foundation for the Environment and Economy should be denied as it raises First Amendment concerns.

13. There is no cause to dismiss this application as requested by UET since it would serve no apparent purpose and would delay consideration of the substantive issues of the case further.

## **ORDER**

### **IT IS ORDERED** that:

1. Pacific Gas and Electric Company must pay a penalty of \$1,050,000 by check or money order payable to the California Public Utilities Commission and mailed or delivered to the Commission's Fiscal Office at 505 Van Ness Avenue, Room 3000, San Francisco, CA 94102, within 30 days of the effective date of this order. The face of the check or money order should read "For deposit to the General Fund per [Decision XX-XX-XXX]."

2. In addition to the *ex parte* restrictions and requirements of Article 8 of the Commission's Rules of Practice and Procedure and any other requirements by order of an Administrative Law Judge, for a period of one year from the effective date of this decision:

- a. Pacific Gas and Electric Company (PG&E) is prohibited from engaging in any oral or written *ex parte* communications with commissioners or their advisors, other than in all-party meetings, in any ratesetting proceeding.
- b. PG&E is prohibited from engaging in any communications with commissioners or their advisors concerning any procedural issue in a formal adjudicatory or ratesetting proceeding. PG&E may direct any such communications to the assigned Administrative Law Judge or, if none is assigned, to the Chief Administrative Law Judge.
- c. PG&E shall report all communications with the following staff acting in an advisory capacity on any adjudicatory or ratesetting proceeding: the General Counsel, the Executive Director, the Deputy Executive Directors, Division Directors, and Deputy

Division Directors, regarding any substantive or procedural issue, within three days and consistent with the reporting requirements of Rule 8.4 of the Commission's Rules of Practice and Procedure.

- d. These restrictions shall be in force for a period of one year from the effective date of this decision for all ratesetting and adjudicatory proceedings other than this one. For this proceeding, these restrictions shall be in force until the resolution of this proceeding, including resolution of any applications for rehearing.

3. As a ratemaking remedy and reparation to mitigate the potential ratepayer impact of Pacific Gas and Electric Company's (PG&E's) *ex parte* violations causing a delay in the resolution of this proceeding, PG&E's shareholders will be required to fund a disallowance of a portion of revenues no larger than would be amortized over the five-month period of the original scheduled final decision in this proceeding (March 2015) and the modified schedule (August 2015) contained within a revised scoping memo issued November 13, 2014. The final ratemaking treatment of this remedy will be calculated in the final decision in this proceeding.

4. The sanctions and remedies ordered in this decision are in response only to the disclosures by Pacific Gas and Electric Company in their September 15, 2014 Notice and the October 7, 2014 law and motion hearing in this proceeding. Nothing in this decision precludes further discovery by parties in this or any other proceeding, nor does it preclude future Commission action related to any other violations that may be subsequently discovered.

5. This decision is effective immediately.
6. Application 13-12-012 and Investigation 14-06-016 remain open.

This order is effective today.

Dated November 20, 2014, at San Francisco, California.

CATHERINE J.K. SANDOVAL  
CARLA J. PETERMAN  
MICHAEL PICKER  
Commissioners

President Michael R. Peevey recused himself from this agenda item and was not part of the quorum in its consideration.

Commissioner Michel Peter Florio recused himself from this agenda item and was not part of the quorum in its consideration.